EPA Region 10 comments to ITD on FEIS and ITD's responses as published in the ROD

Related to LEDPA and the Clean Water Act

ITD defers LEDPA determination to ACE during the CWA process.

Aquatic Resources
Staff in our Aquatic Resources Unit offers the following comments regarding compliance with the 404(b)(1) Guidelines.

CWA Section 404(b)(1) Guidelines
Section 404 of the Clean Water Act (CWA) established the permitting program for the discharge of dredged and fill material into waters of the United States (U.S.) at specified disposal sites. This program is co-administered by the U.S. Army Corps of Engineers (Corps) and EPA. Section 404(b)(1) required the EPA, in conjunction with the Corps, to develop guidelines for the specification of disposal sites. The guidelines, referred to as the 404(b)(1) Guidelines (Guidelines), were to be patterned after the ocean discharge criteria developed by Congress and included in the CWA.

The purpose of the Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the U.S. through control of discharges of dredged or fill material. They were codified in regulation (40 CFR Part 230) in 1980 and form the substantive environmental criteria used by the Corps when they review proposed discharges and issue permits under Section 404. The Guidelines prohibit issuance of a permit that would cause an avoidable or significant adverse impact to waters of the U.S.

Compliance with the Guidelines is required before a 404 permit can be issued by the Corps, and demonstrating compliance is the responsibility of the applicant. Section 230.10 contains the four principle requirements for compliance. Failure to *"clearly demonstrate"* that there is no *"practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem"*, in accordance with § 230.10(a), renders the project noncompliant with the Guidelines. Similarly, if an application contains insufficient information to determine compliance, the Guidelines require that no permit be issued.

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Alternatives Analysis
Pursuant to §230.10(a), an alternatives analysis is conducted to identify practicable alternatives to a proposed discharge. An alternative is practicable if it is available and capable of being done and would achieve the overall project purpose. Practicable alternatives with fewer adverse impacts are presumed to exist for non-water dependent activities unless *"clearly demonstrated otherwise."* The environmental impacts of the various practicable alternatives are then compared so that the Corps can ensure it is authorizing only the practicable alternative which generates the least environmental damage. This alternative is referred to as the Least Environmentally Damaging Practicable Alternative (LEDPA). Except as permitted under Section 404(b)(2), the Guidelines prohibit the authorization of any alternative that is not the LEDPA.

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51j See FEIS Response to EPA comments (L-28) in FEIS section 10.3. The LEDPA will be determined by the USACE during the Section 404 permitting process after the 404(b)(1) analysis has been performed.

Definition of Practicability

"An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" [§ 230.10(a)(2)]. As noted above, the overall project purpose plays a critical role in determining whether a particular alternative is practicable or not. The consideration of cost, existing technology, and logistics is to determine whether one or more of these factors render an alternative unavailable and/or incapable of being done. This is a very high standard, and an alternative must be demonstrated to be impracticable before it can be excluded from analysis.

The purpose of consideration of cost is not to compare the cost of different alternatives but to determine whether or not the costs of a specific alternative are so prohibitively high (beyond industry standard) that the alternative is rendered unavailable and capable of being done. As stated in the preamble to the Guidelines: *"The consideration of cost is not an economic analysis." "The mere fact that an alternative may cost somewhat more does not necessarily mean it is unreasonably expensive and therefore not practicable"* (45 FR 85339). For these reasons, the following statement in the Screening of Alternatives Technical Report cannot be supported: "[Weighing] *the proposed alignments against one another based on cost. It was determined that alignments that cost the least were preferred"* (p. 11). 51m

51m Thank you for your clarification of the definition of "practicability". The LEDPA will be determined by the USACE during the Section 404 permitting process after the 404(b)(1) analysis has been developed. While ITD has considered the maintenance and operating costs during the EIS analysis, these costs were not factored into the construction costs and is therefore consistent with EPA's policy of not including those costs in the 404(b)(1) analysis. Practicable alternatives will be evaluated by USACE during the Section 404 permitting process. See General Response Alternatives regarding the rationale for selecting the E-2 Alternative.

The consideration of existing technology and logistics are handled similarly to that of cost. For example, an alternative that requires the use of advanced (but existing) technology that is available and capable of being done (e.g., horizontal directional drilling versus trenching) is a practicable alternative. Similarly, an alternative that is logistically more complex but is still available and capable of being done is a practicable alternative.

Although not included in ITD's construction cost estimates at this time, as general information, it is EPA policy that use of life cycle, including maintenance, cost in the 404(b)(1) analysis of practicable alternatives is not appropriate. The EPA considers maintenance and operating costs or long term costs over the life cycle of the project as "cost of doing business." It does not affect the capability of a project to be done, and thus is not appropriate to be considered for determination of practicable alternatives under the Guidelines.

Evaluating practicability is a conclusive determination; that is to say, an alternative either is or is not practicable. Alternatives are evaluated independently. It is inappropriate to compare one alternative against another in determining practicability, for an alternative cannot be more or less practicable than another. For these reasons, the EPA cannot support ITD's reasoning that because Alternative E-2 would provide the *"greatest safety benefit which best meets the project purpose and need"*, is it more practicable than the Modified W-4 or C-3 alternatives. If a particular threshold for crash rates must be met, this should be explicit in the definition and selection of practicable alternatives. Presently, all three alternatives carried forward in the Final EIS have been identified as being available and capable of being done, and would achieve the project purpose and need. 51n

51n See Response F-51m. See FEIS page 154 for a description of what is included in the costs stated in the FEIS. The clarification that the practicability of alternatives is not a relative comparison is clarified in the ROD under Section 6, Permits.

Conclusion regarding aquatic resources

The Final EIS does not adequately demonstrate how the proposed project complies with the Guidelines (i.e., that Alternative E-2 is the LEDPA). The Guidelines are explicit in that *"no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences"* (§230.10(a)].

The EPA continues to have the following concerns:

1. The approach to selecting a preferred alternative is inconsistent with the Guidelines. The Final EIS inappropriately compares one alternative against another in determining practicability. An alternative either is or is not practicable; one cannot be more or less practicable than another. Additionally, the mere fact that an alternative may cost more than another does not necessarily mean it is unreasonably expensive and therefore not practicable.

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2. Absent a final project design to review, the EPA is unable to determine whether ITD has taken all appropriate and practicable steps to avoid and minimize adverse impacts, to ensure compliance with the Guidelines. Exhibit 29, Wetland Effects, shows only conceptual areas of impacts; site-specific drawings (e.g., cross-section views) are not available to discern how the project would in fact be constructed across mapped waters of the U.S.

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51q The FEIS alternatives are based upon a conceptual level of detail. Additional design detail will be available during final design when geotechnical and topographic information is available.

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The LEDPA will be determined during final design when more detail is available.

3. The wetlands within the project area drain into either the South Fork of the Palouse River or Thorn Creek, both of which are listed as impaired waterbodies by the Idaho Department of Environmental Quality (Chapter 4, Environmental Consequences, p. 173). Given that 97% of the Palouse wetlands have been lost, the remaining wetlands—albeit disturbed—serve a critical role in protecting and enhancing water quality of these and other downstream waters, as well as providing valuable habitat. Notably, the Total Maximum Daily Load (TMDL) Report for the South Fork Palouse River states: *"Most of the wetlands and flood plains in the Palouse have been eliminated by modern land use, urbanization, and transportation infrastructure. These activities have affected instream flows, channel sinuosity, and habitat diversity. The topography, soils, and climate make the Palouse watershed very susceptible to erosion. Land uses that contribute excess sediment, nutrients, and bacteria to the river can degrade water quality."*[3] We noted in our March 25, 2013 letter that the approved TMDL for the South Fork Palouse River specifically recommends riparian area restoration and stream buffer zones to reduce temperatures and filter nutrients, sediment, and bacteria from direct delivery to the river. The Final EIS does not appear to seriously consider the issue of declining quality and quantity of aquatic resources in the area.

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51t The FEIS disclosed that the E-2 Alternative will impact the greatest amount of wetlands and will affect higher quality wetlands compared to the other alternatives.

It will affect headwater tributaries that drain to the South Fork Palouse River, a TMDL-listed water. Mitigation measures are discussed in the ROD Section 7, Mitigation-Avoidance, Minimization and Compensatory Mitigation.

General Response Alternative

Why did FHWA and ITD identify the E-2 Alternative as their preferred alternative?

The E-2 Alternative was identified as FHWA's and ITD's Preferred Alternative because it balances the human and natural resource impacts with the public need for a safe and efficient transportation system. Some of the considerations are:

- It would have the greatest safety improvement
- It would have the fewest access points
- It would have the shortest length of five lane section and therefore would be safer
- It would have the least effect to streams
- It would avoid effects to cultural/Section 4(f) resources, floodplains and business impacts.

The primary disadvantages of E-2 Alternative compared to the other alternatives are that it will be located along the base of Paradise Ridge and will be closer to it but will not go over it. This could increase weed establishment and spread up to 0.6 miles from the roadway. Paradise Ridge provides moderate or marginal ungulate habitat and E-2 will affect pine stands that offer long-eared myotis, northern alligator lizard and pygmy nuthatch habitat. The pine stands also provide habitat for other diverse species. See General Response NEPA for detail regarding the NEPA process.